

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER KING, J.D. A/K/A
KINGCAST, JOHN NOVAK, and
CYNJO RAYLENE HALL,

Plaintiffs,

v.

JANE RUSHFORD, past Chair of the
Liquor and Cannabis Board; DAVID
POSTMAN, Chair of the Liquor and
Cannabis Board; RICK GARZA, Director
of the Liquor and Cannabis Board; JAY
INSLEE, Governor of Washington; and
ROBERT FERGUSON, Washington
Attorney General

In their Individual and Official Capacities,

Defendants.

NO. 2:20-CV-01494-RAJ

STATE DEFENDANTS' REPLY
IN SUPPORT OF THEIR
MOTION TO DISMISS
PURSUANT RULE 12(B)(1), (2)

**PREVIOUSLY NOTED ON
MOTION CALENDAR:**

October 29, 2021

I. INTRODUCTION

This Court previously ruled that it lacks jurisdiction over both the subject of Plaintiffs' allegations, and personal jurisdiction over the Defendants. Nothing in Plaintiff's Second Amended Complaint changes that analysis. Therefore, the Court should dismiss this action, with prejudice, and grant judgment for the Defendants.¹

¹ As Defendants noted in their Opposition to Plaintiffs' Request to Instantly File, Plaintiffs filed their Response to Plaintiffs' Motion to Dismiss more than a week late, and without leave of the Court. While Defendants believe the Court should not countenance that late filing, they file this Reply out of an abundance of caution.

II. ARGUMENT

A. The Court Should Strike the Non-Pleading Materials Submitted with Plaintiffs' Response

Defendants filed their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b), seeking a decision based on the pleadings. Dkt. # 95. Motions for Judgment on the pleadings are limited to consideration of the pleadings, including any documents attached to the pleadings, as well as those documents that are necessarily incorporated by reference in the complaint, or which are integral to the complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989) ("material which is properly submitted as part of the complaint may be considered.") (citing *Amfac Mtg. Corp. v. Arizona Mall of Tempe*, 585 F.2d 426 (9th Cir. 1978)). Assuming *arguendo* that the various attachments submitted with Plaintiffs' Second Amended Complaint were "properly submitted as part of the Complaint," Defendants hereby move this Court, pursuant to LCR 7(g), to strike the following materials submitted with Plaintiffs' Reponse: Appendix A (Dkt #102-1); Appendix B (Dkt #102-2); Appendix E (Dkt # 102-5); and Appendix G (Dkt # 102-7). These documents were neither attached to the Complaint, incorporated by reference in the Complaint, nor integral to the Complaint and are not properly before the Court.

B. Plaintiffs' Claims Are Premised Entirely on Questions of State Law, and therefore the Court Lacks Jurisdiction under 28 U.S.C § 1331

As Defendants have previously explained, the Court's jurisdiction under 28 U.S.C. § 1331 requires the Plaintiffs to establish that the matter either arises under federal law or necessarily involves the resolution of a substantial question of federal law. *See Cook Inlet Region, Inc., v. Rude*, 690 F.3d 1127, 1130 (9th Cir. 2012).

"A case arise[es] under federal law within the meaning of § 1331 . . . if a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Cook Inlet Region, Inc.*, 690 F.3d at 1130 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*,

1 547 U.S. 677, 689-90, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)). A plaintiff may not establish
 2 federal jurisdiction simply by including in its complaint allegations of federal-law questions that
 3 are not essential to its claim. *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019).

4 As has been clear since the filing of Plaintiffs' First Complaint, Plaintiffs' claims all
 5 require resolution of Washington law, not federal questions. In plainest terms, Plaintiffs allege
 6 that the scope of authority Washington's statutes confer on LCB's enforcement officers is limited
 7 with regard to marijuana; that LCB officers are not peace officers under Washington law; and
 8 finally, that any marijuana enforcement activity by LCB officers necessarily violates
 9 unspecified federal constitutional rights and the terms of a federal asset sharing program.
 10 Dkt. # 101 1-14; Dkt. # 93 ¶¶ 14-84. Plaintiffs fully elide the questions of Washington law they
 11 raise, i.e. what is the scope of LCB authority. Dkt. # 101, 1-14. But that is the fundamental
 12 question that requires resolution to support any of Plaintiffs' claims. And Plaintiffs point to no
 13 federal statute that provides for this cause of action. *Id.*

14 The same is true as to Plaintiffs' claims regarding LCB's alleged failure to properly
 15 exercise its authority to test and impound marijuana. *See e.g.*, Dkt. # 93 ¶ 92 (discussing the
 16 application of WAC 314-55-225); ¶ 96 (asserting potential changes to LCB's statutory
 17 authority); and ¶¶ 99-104 (asserting that Plaintiff Novak cannot access strains of cannabis
 18 available prior to the establishment of Washington's open cannabis industry by Initiative 502 in
 19 2012); at 31 (seeking "Declaratory Judgment and an Order relative to the fact that LCB cannot
 20 establish adherence to RCW 42.52.080(2) on testing and destruction of hot pot. . . ."). Of course,
 21 each of these claims is a claim that LCB (notably, not any of the individual defendants) is failing
 22 to follow Washington, not federal, law.

23 This case does not "arise out of federal law" or "depend on resolution of a substantial
 24 question of federal law," and the Court lacks jurisdiction over this action. *Cook Inlet Region,*
 25 *Inc.*, 690 F.3d at 1130.

C. Defendants Have not Waived their Immunity Under the Eleventh Amendment

In the Court’s order granting Defendants’ original Motion to Dismiss, the Court recognized that “a state’s immunity under the Eleventh Amendment extends to its agencies and departments,” and “to state officials who allegedly violated state law in carrying out their official responsibilities.” Dkt. # 91. Most importantly, the Court recognized that “LCB has not waived its immunity” and thus “the Court lacks jurisdiction over claims against the LCB.” Dkt. # 91.

Plaintiffs continue to insist that they may assert claims against the Defendants in their official capacities. Dkt. # 101, 19-21. To do so they rely solely on the fact that the State of Washington waived its immunity under the Eleventh Amendment in a completely unrelated matter, *Perry Failing*. *Id.* That, of course, proves Defendants’ point: the State must “unequivocally evidence the state’s intention to subject itself to the jurisdiction of the federal court,” as Washington did in *Perry Failing*. *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir. 1999). But the State’s waiver of immunity in one action does not act to waive the State’s immunity in all other actions. *See, e.g., Tegic Communications Corp. v. Board of Regents of University of Texas System*, 458 F.3d 1335, 1342 (Fed. Cir. 2006) (“We agree with the University that its filing of the Texas action did not establish waiver as to this separate action.”). The State has not waived its immunity in this action, and the Defendants are immune in their official capacities.

D. Defendants Are Entitled to Qualified Immunity for Any Claims Made Against them in their Personal Capacities

Qualified immunity shields government officials performing discretionary functions as long as their conduct does not violate clearly established constitutional law of which a reasonable person should have known. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The test is whether the facts alleged by the plaintiff make out a violation of a constitutional right and, second, whether the right at issue was “clearly established” at the time of the alleged violation. *Id.* The first question is whether the facts alleged by Plaintiffs,

1 pursuant to Rule 12(b)(6), establish a violation of a constitutional right. *Id.* This requires that
 2 Plaintiffs allege specific actions, taken by specific named individuals, and the identification of
 3 the constitutional right that was allegedly violated. Plaintiffs’ allegations fail on both ends.

4 First, as explained more extensively in Defendants’ Motion to Dismiss, Plaintiffs have
 5 not alleged a single, specific action committed by a single named defendant, instead relying on
 6 bare, conclusory statements such as the allegation Postman, “willfully engages staff in Arbitrary,
 7 Capricious and Ultra Vires policies.” *See* Dkt. # 95 at 9-10. Further, Plaintiffs include no specific
 8 allegations regarding how a lack of quality and variety in available marijuana strains or the
 9 purported ultra vires activity of LCB enforcement officers violates their protections against self-
 10 incrimination and involuntary servitude, due process rights, or their right to equal protection of
 11 the laws. *See Hamilton v. Brown*, 630 F.3d 889 (9th Cir. 2011).

12 And, Plaintiffs have no answer as to how they have a federal constitutional right
 13 stemming from engaging in an illegal activity. There is no such right protected under the United
 14 States Constitution. *See Vell Harris v. California Medical Forensic Service*, 2016 WL 5407820
 15 at *3 (N.D.Ca. 2016) (finding no viable constitutional claim in denying the plaintiff access to
 16 medical marijuana while incarcerated, “no plausible federal claim can be drawn from plaintiff’s
 17 allegations regarding the denial of his requests to use marijuana, which is illegal under the federal
 18 Controlled Substances Act. . . .”) (internal citations omitted); *see also Vail v. City of*
 19 *Sacramento*, 2019 WL 3500518 at *5 (E.D.Ca. 2019) (“federal law does not recognize any
 20 protectible liberty or property interest in the cultivation, ownership, or sale of marijuana.”)
 21 (internal citations omitted). “In order to state a claim for relief under § 1983, Plaintiff must satisfy
 22 the “linkage requirement”—meaning that he must link each named Defendant with some
 23 affirmative act or omission that demonstrates a violation of Plaintiff’s federal rights.” *Scalia v.*
 24 *County of Kern*, 308 F.Supp.3d 1064, 1072 (E.D.Ca. 2018). Plaintiffs’ Second Amended
 25 Complaint fails to include any specific allegations against any specific named defendants, and
 26

1 fails to link those allegations to any deprivation of constitutional rights. Their bare allusions to
2 claims arising under 42 U.S.C. § 1983 are insufficient to survive dismissal.

3 **III. CONCLUSION**

4 For the reasons set forth in Defendants' Motion to Dismiss, the Defendants are entitled
5 to judgment, and the Court should dismiss this action with prejudice.

6
7
8 DATED this 5th day of November 2021.

9 ROBERT W. FERGUSON
10 Attorney General

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CERTIFICATE OF SERVICE

I, Jonathan E. Pitel, hereby certify that on November 5, 2021, I caused the foregoing STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO RULE 12(B)(1), (2), to be served upon the below listed Plaintiffs by First Class United States mail via Consolidated Mail Service, as well as an electronic copy, marked for delivery to:

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THE HONORABLE RICHARD JONES
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of November, 2021 at Olympia, WA.

JONATHAN E. PITEL, WSBA 47516
Assistant Attorney General